IN THE

Supreme Court of the United States

October Term, 1976

Nos. 76-212, 76-458, 76-468, 76-515

THE METROPOLITAN SCHOOL DISTRICT OF PERRY TOWNSHIP, MARION COUNTY, INDIANA,
Appellant,

No. 76-212

v.

DONNY BRURELL BUCKLEY, et al.,
Appellees.

THE SCHOOL TOWN OF SPEEDWAY, MARION COUNTY, INDIANA, et al.,
Appellants,

No. 76-458

v.

DONNY BRURELL BUCKLEY, et al.,
Appellees.

THE METROPOLITAN SCHOOL DISTRICTS OF LAWRENCE, WARREN and WAYNE TOWNSHIPS, MARION COUNTY, INDIANA; et al.,
Appellants-Petitioners,

No. 76-468

v.

DONNY BRURELL BUCKLEY, et al.,
Appellees-Respondents.

OTIS R. BOWEN, et al.,
Petitioners,

No. 76-515

v.

UNITED STATES OF AMERICA, et al.,
Respondents.

ON APPEALS OR PETITIONS FOR WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MOTION TO DISMISS APPEALS AND BRIEF IN OPPOSITION FOR RESPONDENT BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS

SIGMUND J. BECK
JOHN WOOD
H. ANDREW SONNEBORN

BAMBERGER & FEIBLEMAN
500 Union Federal Building
Indianapolis, Indiana 46204
(317) 639-5151

Attorneys for Respondent.

Central Publishing Company, Inc., Indianapolis, Ind. 46206

INDEX

CITATIONS

CITATIONS—Continued

Statutes and Rules—Continued

IN THE

Supreme Court of the United States

October Term, 1976

Nos. 76-212, 76-458, 76-468, 76-515

THE METROPOLITAN SCHOOL DISTRICT OF PERRY TOWNSHIP, MARION COUNTY, INDIANA,
Appellant,

No. 76-212

v.

DONNY BRURELL BUCKLEY, et al.,
Appellees.

THE SCHOOL TOWN OF SPEEDWAY, MARION COUNTY, INDIANA, et al.,
Appellants,

No. 76-458

v.

DONNY BRURELL BUCKLEY, et al.,
Appellees.

THE METROPOLITAN SCHOOL DISTRICTS OF LAWRENCE, WARREN and WAYNE TOWNSHIPS, MARION COUNTY, INDIANA; et al.,
Appellants-Petitioners,

No. 76-468

v.

DONNY BRURELL BUCKLEY, et al.,
Appellees-Respondents.

OTIS R. BOWEN, et al.,
Petitioners,

No. 76-515

v.

UNITED STATES OF AMERICA, et al.,
Respondents.

ON APPEALS OR PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION TO DISMISS APPEALS AND BRIEF IN OPPOSITION FOR RESPONDENT BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS

OPINIONS BELOW.

The opinion of the Court of Appeals (Perry A1-A35)[1] and the opinion of the District Court (Perry A36-A50) are unreported. Earlier opinions of the Court of Appeals are reported at 474 F.2d 81 and 503 F.2d 68. Earlier opinions of the District Court are reported at 332 F.Supp. 655 and 368 F.Supp. 1191, 1223.

JURISDICTION.

IPS asserts that the jurisdiction invoked under 28 U.S.C. § 1254(2) by appellants in Nos. 76-212, 76-458 and 76-468 is lacking, for the reasons stated in the motion to dismiss, *infra*. Jurisdiction is properly invoked only under 28 U.S.C. § 1254(1) and 28 U.S.C. § 2103.

QUESTIONS PRESENTED.

The questions presented in all four petitions for certiorari and jurisdictional statements may fairly be combined and summarized as follows:

Whether the lower courts erred in holding that the Uni-Gov legislation reorganizing municipal government in Marion County and contemporaneous legislation affecting the relation between school district and civil city boundaries, enacted while the issue of *de jure* segregation in

---

[1] In this brief appellant in No. 76-212 is referred to as "Perry," appellants in No. 76-458 are referred to as "Speedway," appellants-petitioners in No. 76-468 are referred to as "Lawrence" and petitioners in No. 76-515 are referred to as "State." Appendices are referenced by the appropriate name with the appendix page number. The abbreviation "pet." refers to the body of the petition or jurisdictional statement, as the case may be. Appellee-Respondent Board of School Commissioners of the City of Indianapolis and its school corporation are sometimes referred to herein as "IPS."

IPS was pending in the District Court, and the location of new public housing projects solely within IPS, separately or in combination, substantially caused interdistrict segregation in Marion County schools warranting a cross-district remedy under the legal standards articulated by this Court in *Milliken v. Bradley*, 418 U.S. 717 (1974).

CONSTITUTIONAL AND STATUTORY PROVISIONS.

The constitutional and statutory provisions involved are set out in the appendices to each of the respective petitions and jurisdictional statements.

STATEMENT OF THE CASE.

An accurate statement of the proceedings below is contained in the petition in No. 76-520 filed by the Board of School Commissioners of the City of Indianapolis.

Appellants in No. 76-458 are incorrect in stating that the Uni-Gov legislation was the only issue properly before the trial court (Speedway pet. 9); the Court of Appeals found otherwise (Perry A15, n. 8). Also, contrary to the assertion in No. 76-515 (State pet. 14), the lower court here did find that the location of housing projects by instrumentalities of the State of Indiana caused and perpetuated segregation of black pupils in IPS and that the actions of these agencies caused the suburban school districts to remain segregated (Perry A39).

The statements of Appellants in No. 76-458 that "neither petitioners nor the communities they serve have ever been a part of IPS or the City of Indianapolis" (Speedway pet. 5) and that Speedway and Beech Grove "were thus unaffected by Uni-Gov in their status as separate municipal corporations" (Speedway pet. 6) are inaccurate and mis-

leading by omission of certain material facts. True, the Uni-Gov statute defines Speedway and Beech Grove as "excluded cities," they retain their own local governments providing certain municipal services, and their boundaries coincide with Appellants' school corporation boundaries. But as the Court of Appeals correctly found:

> "... Nonetheless, Uni-Gov has significant powers even in the excluded cities. It is in charge of air pollution regulation, building code enforcement, and municipal planning and thoroughfare control. Moreover, the citizens of the excluded cities vote in Uni-Gov elections." (Perry A10).

The District Court characterized citizens of Beech Grove and Speedway as having a "dual status." (Perry A38, n. 1)[2]

Other factual inaccuracies exist in the petitions which are not pertinent to the issues presented. The most signifi-

[2] The Uni-Gov statute provides additional evidence of such dual status, of which the lower courts could have taken judicial notice. For example, the Mayor of Indianapolis is the chief executive officer and the Indianapolis City-County Council is the legislative body of Marion County, which includes all the territory of the "excluded cities." I.C. 18-4-4-7; 18-4-4-4. Each of the six statutory departments of the City of Indianapolis, the directors of which are appointed by the Mayor, exercises significant functions or taxing authority over the entire county. In addition to those mentioned by the Court of Appeals, the Department of Administration (I.C. 18-4-7) controls purchasing, personnel and legal services for the county; the Department of Public Works (I.C. 18-4-9) has county-wide responsibility for drainage and flood control; the Department of Public Safety includes a county-wide civil defense division (I.C. 18-4-12-52) and the Department of Parks and Recreation (I.C. 18-4-13) administers a county-wide park system for which all county residents are taxed. All these services are substantially the same for the residents of Speedway and Beech Grove as for the residents of Indianapolis in the other suburban school corporations.

cant finding by the District Court relevant to the issues presented is as follows:

> "When the General Assembly expressly eliminated the schools from consideration under Uni-Gov, it signaled its lack of concern with the whole problem and thus inhibited desegregation with [sic] IPS.
>
> The Court finds that the establishment of the Uni-Gov boundaries without a like re-establishment of IPS boundaries, given all of the other facts and circumstances set out in this and former opinions of this Court, warrants a limited interdistrict remedy within all of Marion County, Indiana as hereafter described." (Perry A41).

The Court of Appeals, in affirming the District Judge, stated as follows:

> "Although Uni-Gov was a neutral piece of legislation on its face with its main purpose to efficiently restructure civil government within Marion County, it cannot be analyzed in isolation if its impact on school district boundaries is to be clearly perceived. Rather it must be considered in conjunction with the two other acts adopted in 1969.
>
> For some time Mayor Lugar had expressed his desire to embark on a more aggressive annexation program in order to bring a greater part of the urbanized area under the city's control. The concept of Uni-Gov was promoted as a more viable alternative to lengthy annexation litigation. The suburban school corporations and their legislative representatives were obviously aware that if Uni-Gov did not pass and the civil city was forced to embark on a more aggressive annexation program as a last resort to reorganizing governmental services, IPS boundaries would automatically extend with the civil city boundaries under the 1961 Annexation Act. In order to avoid this undesired result Chapter 52, 1969 Acts was enacted six-

teen days before Uni-Gov was adopted. This act repealed the provision in the 1961 Act which provided for automatic extension of school city boundaries with the extension of civil city boundaries. Chapter 239, 1969 Acts was also adopted, limiting remonstrances against municipal annexations to a few, simple, fairly objective grounds.

> *It must be kept in mind that at this time both the General Assembly and the suburban school districts knew that this action was pending in district court. These 'fail safe' measures indicated a legislative intent (reflecting local sentiments) that by one means or another the boundaries of IPS would not expand with those of the civil city. We say this because a court is entitled to draw reasonable and logical inferences from probable consequences of changes in the law and the evident purpose of such changes."* (Emphasis added.) (Perry A17-A19).

From these facts the Court of Appeals was convinced that "the essential findings for an interdistrict remedy found lacking in *Milliken* are supplied by the record in the instant case." (Perry A20). It concluded:

> ". . . Uni-Gov and its companion 1969 legislation were '[A] substantial cause of interdistrict segregation,' *Milliken v. Bradley,* 418 U.S. 717, 745 (1974), and '[C]ontributed to the separation of the races by . . . redrawing school district lines. . . .' *Id.* at 755 (Stewart, J., concurring)." (Perry A19)

MOTION TO DISMISS APPEALS.

Appellants in Nos. 76-212, 76-458 and 76-468 seek to appeal the decision of the Court of Appeals to this Court under 28 U.S.C. § 1254(2), which provides in part that cases may be reviewed "by appeal by a party relying on a state statute held by a court of appeals to be invalid

as repugnant to the Constitution . . ." Appellants contend that the Court of Appeals held invalid as applied to them the Indiana statutes set forth in Perry Appendix D (A53-A82). But Appellants fail to point to any language in either the decision of the District Court or the Court of Appeals in which any of these statutes was held unconstitutional and inapplicable to Appellants or any other party, person or entity.

The judgment of the District Court, as affirmed (Perry A47-A50 and A51), rather than the posing of questions in the initial opinion of the District Court (Perry pet. 5), determines whether the Court held a statute unconstitutional. That judgment simply ordered transfers of black students from IPS to Appellant school districts, and was grounded upon the conclusion of the courts below that the legislation in question, considered in combination and together with the other relevant facts of the case previously established in earlier decisions, constituted state action which sufficiently caused interdistrict segregation under the applicable legal standard of *Milliken v. Bradley,* 418 U.S. 717 (1974), to warrant a remedy crossing school district lines. As the Court of Appeals stated (Perry A16, n. 8), the District Court considered

> ". . . official conduct which arguably bears a historical relationship to the failure to expand the IPS boundaries to match those of Uni-Gov, which includes the failure to change IPS boundaries during the 1959-1962 Indiana school reorganization program and the failure to locate any public housing outside the IPS boundaries. On the intervening plaintiffs' theory of the case which the district court adopted, this course of conduct was a part of a pattern, of which Uni-Gov was also a part."

Milliken does not require a holding that state statutes are unconstitutional as a prerequisite to state action

causing interdistrict segregation and thus justifying an interdistrict remedy. As Mr. Justice Stewart stated, once the initial equal protection violation has been established the question of scope of the remedy concerns "the appropriate exercise of federal equity jurisdiction." 418 U.S. at 753 (Stewart, J., concurring). Mere reliance by an appellant upon a state statute as barring the relief sought by the plaintiff and the rejection of such defense by the Court of Appeals does not suffice to establish a constitutional ruling below appealable under § 1254(2). For example, in *Bradford Electric Light Co. v. Clapper,* 284 U.S. 221 (1931), the appellants relied on a state workmen's compensation law as barring the plaintiff's negligence action against his employer. The Court of Appeals had rejected appellant's contention on the ground that the public policy of the state of injury was contrary to the statutory bar, and this Court dismissed the appeal.

Even if the decisions below are construed as based upon the statutes alone, the courts did not rule any of the statutes invalid either on their face or as applied. The Court's judgment does not, directly or indirectly, require any of the Appellants or any other state officials to take action or to refrain from taking action in conflict with their duties and responsibilities under any of the statutes. I.C. 20-3-14, as amended by Chapter 52 of the 1969 Acts, continues in effect as to any future revision of school district boundaries in Marion County. The Uni-Gov Act, I.C. 18-4 (Acts 1969, Ch. 173) has not been found unconstitutional as to any part of its reorganization of civil government in Marion County, nor does the judgment of the Court consolidate Appellants into a single school district in disregard of I.C. 18-4-3-14, as would be the case if such statute were nullified by a declaration of unconstitutionality. The 1969 annexation law, I.C. 18-5-10-19 et seq. (Acts 1969,

Ch. 293) has not been found unconstitutional or inapplicable with respect to any unit of local government. On the contrary, since the courts found that legislative action caused segregation among school districts, the judgment granted affirmative relief in regard to school assignments in order to achieve relief from *de jure* segregation in schools by means which would have been available had not the legislation reinforced existing segregation and inhibited affirmative relief.

It follows that this case is not analogous to those cases relied on by Appellants as sustaining this Court's jurisdiction under § 1254(2), where the lower courts had found it necessary to enjoin or declare a statute unconstitutional in order to prohibit certain actions which the statute expressly permitted or had been applied to permit. For example, in *Dutton v. Evans,* 400 U.S. 74, 78 (1970), the Court of Appeals had set aside appellee's murder conviction by holding a state statute, interpreted to make admissible in evidence a post-conspiracy hearsay statement of a co-conspirator as an admission against the defendant, violated the Confrontation Clause of the Sixth Amendment. In *United Gas Pipe Line Co. v. Ideal Cement Co.,* 369 U.S. 134 (1962), appellant sought reimbursement for payment of a local tax on the sale of natural gas pursuant to a statute which the Court of Appeals held violative of the Commerce Clause. Likewise in *Detroit v. Murray Corp.,* 355 U.S. 489 (1958), the appellant city sought to assess property taxes against a government subcontractor under a state statute which the lower court held infringed upon the United States' immunity from state taxation. And in *Watson v. Employers Liability Assurance Corp.,* 348 U.S. 66, 70 (1954), appellant's suit for personal injuries in reliance on the Louisiana "direct action" statute had been dismissed by the lower courts on the ground that

the statute violated the Due Process Clause of the Fourteenth Amendment as applied to an insurance policy written and delivered outside the state.[3]

In the present case none of the Appellants has taken any action in reliance upon provisions of the state statutes in question which is prohibited by the decision of the Court of Appeals. None is required to take any action which any of the statutes would prevent. Appellants continue to operate their schools within their geographical boundaries established under the Marion County school reorganization plan, until and unless such boundaries are changed pursuant to the procedures of the 1961 Annexation Act, Acts 1961, Ch. 186, as amended (I.C. 20-3-14).

For these reasons appellee IPS moves the Court to dismiss the appeals in Nos. 76-212, 76-458 and 76-468 for lack of jurisdiction, and to consider the jurisdictional statements therein as petitions for writs of certiorari, pursuant to 28 U.S.C. § 2103 and Rule 19 of the Rules of this Court.

ARGUMENT.

Introduction.

IPS has filed a separate petition for writ of certiorari, asking this Court to review the judgment of the District Court as affirmed by the Court of Appeals, which has been docketed as No. 76-520, and which IPS believes presents issues of general significance and national importance regarding the interpretation and applicability of the Equal Educational Opportunities Act of 1974, 20 U.S.C. § 1701 et seq., the proper procedure to be followed

---

[3] In the additional cases cited in Lawrence pet. 3 this Court dismissed the appeals under 28 U.S.C. § 1254(2) and granted certiorari pursuant to 28 U.S.C. § 2103.

by a district court in the exercise of its equitable powers to formulate a remedy for desegregation of a large urban school system, and the propriety of a court-ordered plan which simply reassigns black students to predominantly white suburban school corporations. The petitions in Nos. 76-212, 76-458, 76-468 and 76-515, however, ask this Court only to determine whether the lower courts correctly applied the legal principles articulated in *Milliken v. Bradley,* 418 U.S. 717 (1974), to the unique facts surrounding the organization and operation of school districts in Marion County, Indiana. For the reasons stated herein, IPS believes that the issues presented by those petitions do not meet the criteria of Rule 19 for review here, and accordingly that certiorari should be denied in each of such cases.

I. The issues presented are essentially factual and evidentiary, challenging concurrent findings and conclusions of two lower courts.

The petitions in Nos. 76-212, 76-458, 76-468 and 76-515 all attempt to challenge factual determinations that the purpose and effect of the 1969 Indiana legislation was to produce a significant racial impact of interdistrict segregation by preventing the expansion of the boundaries of IPS with those of the civil city. Such issues are merely factual ones and do not involve constitutional or other legal principles having general public importance, since they relate only to the sufficiency of the evidence.

Review by this Court is generally confined to matters of law shown by the record. The Court will not pass upon the sufficiency of the evidence or enter into a consideration of assigned errors below in dealing with matters of fact in the absence of glaring error, but rather the determina-

tions of fact below are taken as conclusive in most circumstances. *Besser Mfg. Co. v. United States,* 343 U.S. 444, 448 (1952).

The application of this rule is even clearer where there are concurrent findings of fact by two courts below. The Court will not undertake to review concurrent findings of fact by the District Court and Court of Appeals in the absence of a very obvious and exceptional showing of error. Such findings will ordinarily be accepted by the Court without reexamination of the evidence. *Graver Tank & Mfg. Co. v. Linde Air Prod. Co.,* 336 U.S. 271, 275 (1948); *Allen v. Trust Co. of Ga.,* 326 U.S. 630, 636 (1946); *Anderson v. Abbott,* 321 U.S. 349, 356 (1944); *Goodyear Tire & Rubber Co. v. Ray-O-Vac Co.,* 321 U.S. 275, 278 (1944).

The "two court" rule applies even when matters of fact are only impliedly approved by the Court of Appeals. *Graham v. Brotherhood of Locomotive Firemen & Enginemen,* 338 U.S. 232, 235 (1949). Here the Court of Appeals found that the record supported a limited interdistrict remedy under the *Milliken* criteria as further applied in *Evans v. Buchanan,* 393 F.Supp. 428, 438-446 (D.Del.1975), affirmed, 46 L.Ed.2d 293 (1975) (Perry A22). The Court should not grant certiorari when the scope of its review would preclude consideration of petitioners' contentions that the evidence in the record does not support the factual conclusions of the District Court and Court of Appeals (Perry pet. 19, Speedway pet. 17, Lawrence pet. 29-30, State pet. 20).

II. The petitions for certiorari fail to give accurate information regarding the record and the essential facts upon which the opinions below were based.

In No. 76-468 petitioner alleges that the District Court refused to make a finding of fact that, but for events chargeable to the State, IPS would have expanded to the Marion County line (Lawrence pet. 30). But the District Court concluded:

> "... However, the General Assembly of Indiana, with its members elected on a state-wide basis, was not, or should not have been, subservient to local pressures, and undoubtedly could have legislated a county-wide school system for Marion County as easily as it legislated a county-wide civil government. . . ." (Perry A40).

This example illustrates that petitioners have failed to give accurate information regarding the record upon which this Court can base a decision.

Similarly, the petitioners, in stating that the decision below predicated a constitutional violation solely on the racial impact of statutes adopted and governmental actions taken without a racially discriminatory purpose, have ignored the express language of the Court of Appeals decision and the pertinent facts found below upon which the decision rests. The Court of Appeals expressly found that the General Assembly and the suburban school districts knew this action was pending in District Court and that the statutory enactments indicated the legislative intent that the boundaries of IPS would not expand with those of the civil city (Perry A18). The Court thus found state action having the intent and purpose to perpetuate racial separation in the schools by freezing school district lines while simultaneously annexing petitioners' territory to the

civil city (Perry A19). Such action necessarily had the intended consequences of limiting the remedy which under *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971), inevitably would follow from any finding of *de jure* segregation in IPS in the then pending litigation.[4] As the Court of Appeals observed:

> "There is no dispute that a school district may not contract its territory in order to avoid desegregation. *Cf. Wright v. Council of City of Emporia,* 407 U.S. 451 (1972). Conversely, a city should not be permitted to extend its boundaries in order to avoid desegregation." (Perry A21).

III. There is no conflict between the opinion below and decisions of this Court.

A. Washington v. Davis

Appellants-petitioners claim that the opinion below squarely conflicts with *Washington v. Davis,* 48 L.Ed.2d 597 (1976) (Lawrence pet. 19-24, Perry pet. 21, Speedway pet. 17, State pet. 20-21). This contention misinterprets *Washington* in several ways.

1. The Court in *Washington v. Davis* reaffirmed the long standing rule that a discriminatory racial purpose need not be express nor appear on the face of a statute. Thus, the Court stated:

> "Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another . . ." 48 L.Ed.2d at 608-609.

---

[4] In *Swann* the city and county school districts had been consolidated for nonracial purposes in 1961. 300 F.Supp. 1358, 1362 (W.D.N.C. 1969).

In his separate opinion in *Washington,* Justice Stevens stated:

> "Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds. This is particularly true in the case of governmental action which is frequently the product of compromise, of collective decision making, and of mixed motivation. . . ." 48 L.Ed.2d at 615.

Contrary to the contention of petitioners, the courts below did not rely on disproportionate impact, standing alone, as the "sole touchstone" (*Id.* at 609) of the discriminatory action charged to the state which caused interdistrict segregation. The Court of Appeals merely applied the same legal standard to the interdistrict violation issue which it previously applied to the issue of whether *de jure* segregation existed in IPS, a legal standard which this Court has considered unworthy of review in this case. Thus, in its affirmance of the District Court's finding of constitutional violations by IPS in *Indianapolis I* the Court of Appeals rejected the argument that a finding of "purpose" in the sense of invidious motivation was required:

> "The appellants deny any conscious motivation on the part of their predecessors or themselves to foster, or even continue, segregation policies in the school system; however, in examining that which was in existence at the time of *Brown I* and that which transpired thereafter, the courts are not precluded from drawing the normal inference of intent from consciously consummated acts. Intent, in this sense, may or may not be consistent with expressed motivation." *United States v. Board of School Commissioners,* 474 F.2d 81, 84-85 (7 Cir. 1973), cert. denied 413 U.S. 920 (State A107).

The court recognized that "to show *de jure* segregation, rather than *de facto* segregation, the Government must show improper intent and causation," 474 F.2d at 85 (State A108), and held such showing established by decisions drawing school attendance districts within IPS:

> "The district court made detailed findings regarding a number of practices which it considered supported the ultimate finding of *de jure* segregation. Perhaps the most extensive finding related to gerrymandering of school attendance zones within the allegedly neutral framework of the neighborhood school system. In the Board's initial set of neighborhood boundary lines, the district court found,
>
> '[they] were drawn with knowledge of racial residential patterns and the housing discrimination underlying it. Not only did the Board not attempt to promote desegregation, but the boundary lines tended to cement in the segregated character of the elementary schools.' 332 F.Supp. at 666." 474 F.2d at 85-86 (State A109).

Similar actions by the Denver school board resulted in a finding of unconstitutional segregation in its Park Hill area schools, a finding affirmed by the Tenth Circuit as to which this Court denied certiorari while simultaneously holding such actions sufficient to create a presumption that imbalance in other schools resulted from "intentionally segregative actions" of the board. *Keyes v. School District No. 1,* 413 U.S. 189, 192, 195, 208 (1973). The conclusion of the trial court that Detroit schools were *de jure* segregated was, as this Court noted in *Milliken v. Bradley,* 418 U.S. 717, 725, grounded on board actions having the "natural, probable, foreseeable and actual effect" of creating and perpetuating school segregation within Detroit, a conclusion approved by this Court as consistent with

the *Keyes* standard, 418 U.S. at 738, note 18, and mandating "prompt formulation of a decree directed to eliminating the segregation found to exist in Detroit city schools," 418 U.S. at 753. In *Washington* this Court again reaffirmed the *Keyes* test that "the essential element of de jure segregation . . . 'is purpose *or* intent to segregate,' " 48 L.Ed.2d at 608 (Emphasis added).

This standard was applied to mandate interdistrict desegregation, despite trial court findings that districts were neither created nor gerrymandered for the purpose of effecting segregation and absence of intradistrict *de jure* segregation, in *Haney v. Board of Education of Sevier County,* 410 F.2d 920, 924 (8 Cir. 1969), where the Court said:

> "Simply to say there was no intentional gerrymandering of district lines for racial reasons is not enough. As Mr. Justice Harlan once observed, '[T]he object or purpose of legislation is to be determined by its natural and reasonable effect whatever may have been the motives upon which legislators acted.' New York ex rel. Parke, Davis & Co. v. Roberts, 171 U.S. 658, 681 (1898) (dissenting opinion)...."

The *Haney* decision was cited by this Court as an example of a case where the remedy could properly transcend district lines. *Milliken v. Bradley,* 418 U.S. at 744.

The interedistrict violation illuminated by the lower courts here was premised on the factual finding that at the time Uni-Gov and its companion legislation were enacted, expanding the city to the county line while freezing IPS boundaries which encompassed 95% of the black population of the county, the legislature knew the Government was challenging IPS school segregation in federal court

and the likely consequences thereof (Perry A19).[5] The decision is thus simply an application of legal standards recently articulated by this Court in *Keyes* and *Milliken*. The Court of Appeals majority rightly saw no need to discuss *Washington*, which reaffirmed *Keyes* but was not concerned with school desegregation remedies. Judge Tone's apparent assumption (Perry A27, note 1 and accompanying text) that "racially discriminatory purpose" requires a finding of invidious animus as the principal motivating force of the challenged action and that "equal protection is denied *only*" when such a "purpose" exists is an erroneous analysis of the meaning of *Washington*.

2. Moreover, the Court in *Washington* recognized that disproportionate impact combined with the failure of state officials to acquire information necessary to the proper performance of their duties may be sufficient to satisfy the requirement of discriminatory intent or purpose:

> "A prima facie case of discriminatory purpose may be proved as well by the absence of Negroes on a particular jury combined with the failure of the jury commissioners to be informed of eligible Negro jurors in a community, Hill v. Texas, 316 U.S. 400, 404 (1942) . . ." 48 L.Ed.2d at 608.

The finding of the District Court and the Court of Appeals here that the General Assembly signaled its lack of concern with the whole problem by eliminating schools from consid-

[5] The argument of the State (State pet. 20) that this finding is "factually incorrect" misstates both the record and the issues before the Court. The lower courts did find "interdistrict segregation" in Marion County, and the legislation changed the procedures for drawing school district lines through local governmental action, if not the lines themselves. The principal issue was the nexus between the legislation and the interdistrict segregation.

eration under Uni-Gov is merely an application of *Hill v. Texas* as reaffirmed in *Washington v. Davis*.

3. Finally, decisions of this Court do not require a finding of intent to discriminate as a prerequisite to an interdistrict violation, once the initial constitutional violation necessitating a remedial school desegregation decree has been established. Judge Tone, in his dissent below, assumed that an interdistrict remedy depended upon the establishment of a racially discriminatory purpose independent of the original racially discriminatory purpose found within IPS. But the test of *Milliken v. Bradley* is rather a *causal* one:

> "Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation *within one district* that produces a significant segregative effect in another district." (Emphasis added.) 418 U.S. at 744-745.

That the test is an alternative one of *either* a constitutional violation in which the affected governmental entities are implicated *or* a significant segregative effect resulting from unconstitutional conduct of other officials was expressly stated by this Court in *Hills v. Gautreaux*, 47 L.Ed.2d 792, 801, 802 note 12 (1976).

In *Milliken* all the Justices agreed that the requisite "purpose or intent" to maintain segregated schools was satisfied by the violations within Detroit, 418 U.S. at 738; *Id.* at 762 (Mr. Justice White, dissenting). The Court divided only on the majority's additional requirement that a finding of an interdistrict segregative effect is a prerequisite to a remedy crossing district lines. As in *Milliken*, the District Court here found the State legally responsible

for the operation of all public schools and consequently for segregative actions of IPS, 368 F.Supp. at 1199-1203 (State A43-52). The effect requirement is met here by the finding of the effect of Uni-Gov and related legislation, together with the effect of locating predictably black-occupied housing projects solely within IPS, upon perpetuation of irremediable *de jure* segregation within IPS. Moreover, in *Washington* the Court reaffirmed the holding in *Wright v. Council of City of Emporia,* 407 U.S. 451 (1972), that "the racial impact of a law, rather than its discriminatory purpose, is the critical factor" in "proper circumstances," i.e., interference with an effective remedy for unconstitutional segregation previously established. *Washington v. Davis,* 48 L.Ed.2d at 609-610. *Milliken, Wright* and this case, unlike *Washington,* all concern the permissible scope of a judicial remedy for previously established unconstitutional conduct. The only difference between *Wright* and this case is that the challenged action in *Wright* came after the entry of the remedial decree.

B. James v. Valtierra

Nor is there any conflict between the decision below and prior authority of this Court in relation to the finding predicating an interdistrict violation on the failure to execute cooperation agreements under 42 U.S.C. § 1415(7)(b)(i) and HUD guidelines, as asserted by petitioners in Nos. 76-468 and 76-515 (Lawrence pet. 26, State pet. 22). *James v. Valtierra,* 402 U.S. 137 (1971), involved the constitutional validity of a California referendum procedure, not the failure of city officials to act. The Court emphasized that the record in *James* did not support a claim that a law seemingly neutral on its face was in fact aimed at a racial minority. 402 U.S. at 141. The Court of Appeals found here, on the contrary, that "the Housing Authority had jurisdiction outside the IPS boundaries" and that

"[t]he record supports these findings [of the District Court] and *clearly shows* a 'purposeful, racially discriminatory use of state housing.' *Milliken v. Bradley,* 418 U.S. 717, 755 (1974) (Stewart, J. concurring)." (Perry A23). (Emphasis added).

IV. The facts of this case are peculiar and not likely to recur.

This case involves statutes peculiar to Marion County, Indiana in relation to the reorganization of its county and city government and the influence of that governmental reorganization upon the school districts in Marion County during the pendency of a federal desegregation case. The decisions below gave full consideration to the issue of the effect of those facts under the governing decisions of this court; review by this Court would involve only questions of evidence applied under familiar legal rules. Accordingly, the issues presented in the petitions are not sufficiently important to warrant this Court's attention since they involve issues of state law which are unique to this case.

Under prior precedent of this Court, legislation which is found to have the purpose and effect found by the court below is violative of the Constitution, and under *Milliken* a remedy can be implemented which affects separate school corporations when such facts are found. The appropriate factual findings were made below, and the law applied does not conflict with *Washington v. Davis* or other prior decisions of this Court. The application of this legal standard by the courts below does not involve a significant undecided federal constitutional question, the decision of which would have effect beyond the particular facts of this case, and therefore the questions presented by peti-

tioners do not warrant review by certiorari under Supreme Court Rule 19.

CONCLUSION.

For the reasons given, the appeals in Nos. 76-212, 76-458 and 76-468 should be dismissed, and the Court should deny certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered July 16, 1976 upon the grounds submitted in the jurisdictional statements and petitions in Nos. 76-212, 76-458, 76-468 and 76-515.

Respectfully submitted,

SIGMUND J. BECK
JOHN WOOD
H. ANDREW SONNEBORN

BAMBERGER & FEIBLEMAN
500 Union Federal Building
Indianapolis, Indiana 46204
(317) 639-5151

Attorneys for Respondent.